



March 20, 2001

Ms. Tracey Bright
County Attorney
Ector County
Ector County Courthouse, Room 201
Odessa, Texas 79761

OR2001-1097

Dear Ms. Bright:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 145103.

Ector County (the "county") received a request for information related to a specified assault that allegedly occurred at the Ector County Law Enforcement Center. You claim that the requested information is excepted from disclosure under sections 552.103 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.¹

Section 552.108 (a)(1) excepts from public disclosure information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime if release of the information would interfere with the detection, investigation, or prosecution of crime. Section 552.108(a)(1) excepts information that relates to a pending or ongoing investigation or prosecution. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases); Open Records Decision No. 216 (1978). You indicate that the Texas Rangers are conducting an ongoing criminal investigation of the assault. Where an incident involving allegedly criminal conduct is still under active investigation or prosecution, section 552.108 may be invoked by any proper custodian of information which relates to that incident. Open Records Decision Nos. 474 (1987), 372 (1983); *See also* Open Records Decision No. 586 (1991) (need of another governmental body to withhold requested information may provide compelling reason for non-disclosure under section 552.108). However, from our review of

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

the submitted information, we note that it includes materials from a sexual harassment investigation that concluded in June of 1999. You do not indicate how release of this information would interfere with the ongoing investigation. You do not represent that you have forwarded, or that you intend to forward this information to the Texas Rangers. Nor have you represented that the Texas Rangers have requested that this investigation information be withheld. We find that you have not demonstrated how section 552.108 of the Government Code applies to this information. We find that the remaining submitted information relates to the pending assault investigation. We conclude that you have shown the applicability of section 552.108 to all of the responsive information with the exception of the information generated in the 1999 sexual harassment investigation.

Investigations of sexual harassment are subject to section 552.101 of the Government Code. This section excepts from required public disclosure information that is considered confidential by law, either constitutional, statutory, or by judicial decision. Information may be withheld under section 552.101 in conjunction with the common-law right to privacy if (1) the information contains highly intimate or embarrassing facts about a person's private affairs such that release of the information would be highly objectionable to a reasonable person, and (2) the information is of no legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The court addressed the applicability of the common law privacy doctrine to files of an investigation of allegations of sexual harassment in *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied). The investigation files in *Ellen* contained individual witness statements, an affidavit by the individual accused of the misconduct responding to the allegations, and conclusions of the board of inquiry that conducted the investigation. *Ellen*, 840 S.W.2d at 525. The court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry. *Id.* The *Ellen* court held that as information pertinent to the sexual harassment charges and investigation had been released to the public in summary form, the legitimate interests of the public had been satisfied. *Id.*

Based on *Ellen* and prior decisions of this office, *see e.g.* Open Records Decision Nos. 393 (1983), 339 (1982), a governmental body must withhold the identities of alleged victims and witnesses to alleged sexual harassment as well as any information which would tend to identify a witness or victim. Note, however, that the common law right of privacy does not protect facts about a public employee's alleged misconduct on the job or complaints made about his performance. Open Records Decision Nos. 438 (1986), 230 (1979), 219 (1978). Therefore, the identity of the alleged offender may not be withheld from public disclosure.

Where documents responsive to a request for information contain an adequate summary of a sexual harassment complaint investigation, that summary must be released, with victim and witness identifying information redacted. The remainder of the investigation materials, including the victim and witness statements, must generally be withheld. We find that the sexual harassment investigation materials include a report that is an adequate summary of this investigation. Therefore, information identifying the purported victim or witnesses in

the sexual harassment investigation, as well as the balance of the information generated in the sexual harassment investigation that is not contained in the report, must be withheld under section 552.101 of the Government Code.

The sexual harassment report itself is subject to section 552.022 of the Government Code. This section lists several categories of information that cannot be withheld on the basis of a permissive exception to disclosure such as section 552.103. *See, e.g.*, Open Records Decision No. 522 (1989). In pertinent part section 552.022 provides:

- (a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

...

- (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108.

Therefore, this report must be released with the portion found to be confidential redacted. We have marked the submitted materials accordingly.

We conclude that you must redact the identity of the victim and witnesses, which we have marked, in the submitted completed report, and you must release the remainder of this report. All other responsive information may be withheld.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the

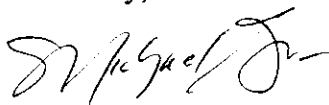
governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Michael Jay Burns
Assistant Attorney General
Open Records Division

MJB/er

Ref: ID# 145103

Encl: Submitted documents

cc: Mr. Spencer W. Dobbs
Attorney at Law
426 North Texas
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(w/o enclosures)